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No. 83 -

In The

Supreme Court of the United States

October Term, 1983

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,

Cross-Petitioner,

v.

MCI COMMUNICATIONS CORPORATION and MCI TELECOMMUNICATIONS CORPORATION,

Cross-Respondents.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This cross-petition for a writ of certiorari raises important questions concerning the accommodation of the antitrust laws to the detailed regulatory scheme of the Communications Act of 1934 (47 U.S.C. §§151 *et seq.*).

First, whether a common carrier's refusal voluntarily to allow another carrier to interconnect with its facilities is subject to antitrust challenge where Section 201(a) of the Communications Act contemplates the denial of interconnections that are not in the public interest and provides a self-contained regulatory mechanism for the requesting carrier to secure the interconnections if its request is found to be in the public interest by the responsible regulatory agency?

Second, in the event the antitrust laws are applicable to such denials of voluntary interconnection, whether a common carrier that has denied interconnections is entitled to jury instructions which explain the structure and effect of Section 201(a) and which require that the carrier's decision not to interconnect be evaluated in the context of that regulatory scheme and against a standard of objective reasonableness, rather than against a generalized standard of subjective intent?

STATEMENT REQUIRED BY RULE 28.1

In addition to wholly-owned subsidiaries, cross-petitioner American Telephone and Telegraph Company ("AT&T") has ownership interests in The Southern New England Telephone Company, Cincinnati Bell, Incorporated, and the Cuban American Telephone and Telegraph Company.

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OPINIONS BELOW

The opinion of the Court of Appeals (App. 1a),[1] as modified by its order of April 11, 1983, denying rehearing, is reported at 708 F.2d 1081. The order of the Court of Appeals denying petitions for rehearing (App. 241a) is not reported. The judgment of the District Court is not reported; however, its instructions to the jury and the jury's special verdict are appended to the Court of Appeals' opinion (App. 209a-237a). The order of the District Court denying cross-petitioner AT&T's motion to dismiss on the ground that the challenged conduct is not subject to the antitrust laws is reported at 462 F. Supp. 1072.

[1] "App." references are to the Appendix filed by cross-respondent MCI as petitioner in No. 83-32. In addition, "Tr." references are to the trial transcript, "DX" references are to AT&T's trial exhibits, and "AT&T Inst." references are to AT&T's proposed instructions in the trial court.

JURISDICTION

The judgment of the Court of Appeals was entered on January 12, 1983. Timely petitions for rehearing, with suggestions for rehearing en banc, were denied on April 11, 1983. On July 8, 1983, AT&T filed a petition for a writ of certiorari limited to the propriety of the Court of Appeals' remand to the District Court for a retrial on damages only (No. 83-21). MCI Communications Corporation and MCI Telecommunications Corporation ("MCI") filed a petition for a writ of certiorari on July 11, 1983 (No. 83-32), and the petition was received by AT&T on that same day. This cross-petition for a writ of certiorari is filed pursuant to Rule 19.5 of the Rules of this Court. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 201(a) of the Communications Act of 1934, 47 U.S.C. § 201(a):

> "It shall be the duty of every common carrier . . . in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers."

Section 2 of the Sherman Act, 15 U.S.C. § 2:

> "Every person who shall monopolize . . . any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony . . . ."

STATEMENT OF THE CASE

Because no final judgment has yet been entered against it, AT&T restricted its own petition to this Court (No. 83-21) to the narrow but important issue of whether the Court of Appeals erred in limiting the retrial of this case to damages only. In the procedural posture of this case, review of this limited issue is appropriate because it would not require a review of the record and

because that error is fundamental to the further conduct of the case. Now that MCI has sought review of substantive issues in this case relating to pricing and damages, AT&T in this cross-petition seeks review of the Court of Appeals' substantive rulings with respect to the remaining interconnection charges. Those interconnection charges are so interrelated with MCI's pricing charges and its damages theory that, in addition to the substantive reasons discussed below, considerations of judicial economy dictate that if the Court were to grant MCI's petition, it should also grant AT&T's cross-petition.

All these petitions arise from MCI's allegations in its complaint in this case that AT&T had unlawfully monopolized the intercity business telecommunications market by engaging in 22 separate actions, the bulk of which fell into one of the following categories: (1) the imposition of unlawful restrictions upon MCI's right to obtain certain kinds of interconnections; (2) the imposition of excessive prices for the interconnections that were provided; and (3) a pattern of predatory pricing with respect to services that were competitive with those offered by MCI. Of the 22 charges in its complaint, MCI has been successful in sustaining six—all limited to the controversy over the kinds of interconnections to which MCI was entitled prior to the resolution of that issue in April 1974 by the Federal Communications Commission ("FCC"). At this stage of the case, therefore, antitrust liability against AT&T rests essentially upon the charge that AT&T violated Section 2 of the Sherman Act by refusing to give MCI certain interconnections—a charge focused upon AT&T's denial of interconnections for FX and CCSA services.

A. Factual and Regulatory Background.

As AT&T pointed out in its petition in No. 83-21, the dispute over the kinds of interconnections to which MCI was entitled grew out of the ambiguities of the FCC's decision in *Specialized Common Carriers*, 29 F.C.C.2d 870 (1971), *aff'd sub nom.*

Washington Utilities & Transportation Comm'n v. *FCC*, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975). Specifically, the dispute related to whether that decision authorized new carriers such as MCI to provide switched communications services such as FX (Foreign Exchange) and CCSA (Common Control Switching Arrangements), and whether, therefore, AT&T had a corresponding obligation to provide MCI with connections to Bell switching machines to enable MCI to offer such services (App. 11a, 88a).[2]

Despite the length and complexity of the *Specialized Common Carriers* decision, it did not define what "specialized" services the new carriers were authorized to provide or what obligations the existing carriers were expected to assume in order to assist the new carriers. As the Court of Appeals recognized, the *Specialized Common Carriers* decision was, in this respect, "extremely opaque" and "hardly a model of clarity" (App. 11a, 88a). Indeed, the trial court characterized it as an "abomination" and "one of the worst examples of legal draftsmanship I have ever seen" (App. 11a n.13). Although the FCC did not mention FX and CCSA in its decision, to the extent that the decision was intelligible on this question, it appeared to hold that MCI and the other new carriers were not authorized to provide FX and CCSA.[3]

[2]As described by the Court of Appeals, "FX and CCSA services are similar to local exchange service in that they provide a connection into a switching machine in a telephone company central office" (App. 8a-9a n.10). FX service permits a user to make and receive calls in a distant city as if they were local calls and is frequently used by hotel and airline reservation services. CCSA service permits "large subscribers . . . to link far flung branches or offices to each other via private telephone lines connected through switches in the telephone company office" (*id.*).

[3]In its decision, the FCC did not define the services it had authorized the specialized carriers to provide (App. 11a). Instead, it found the new entrants' "proposed facilities and services" to be in the public interest and authorized those carriers to provide the services "proposed" (29 F.C.C.2d at 920). The services "proposed" by MCI were limited to "specialized" point-to-point private line services and did not include ser-

(Footnote continued on next page)

After the *Specialized Common Carriers* decision, AT&T took the position in its negotiations with MCI concerning interconnection that the decision related solely to the services "proposed" by MCI and thus that MCI was not entitled to interconnections for FX and CCSA (Tr. 4432-43; Tr. 4807-10). MCI contended in these negotiations and during informal conferences with some FCC staff members in the summer and fall of 1971 that it was entitled to such connections.[4] When AT&T adhered to its position and the staff advised MCI that it would have to present the matter to the FCC if it wanted a definitive interpretation of the decision, it failed to do so. Indeed, for all intents and purposes, MCI appeared to abandon its claim to FX and CCSA interconnections, for in October 1972, both MCI and the FCC took the position—in their briefs defending the *Specialized Common Carriers* decision in review proceedings initiated by the Washington Utilities and Transportation Commission before the Ninth Circuit—that the decision "did *not* permit the offering of 'switched' service (such as FX and CCSA service)" (App. 24la).[5]

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vices requiring connections to Bell switching machines, such as FX and CCSA. MCI expressly represented in its comments to the FCC that it had "no plans to provide switched voice services," that its services would involve "no switching between customers" and that its "service offerings will be strictly *point-to-point*" (DX 13, pp. 13, 167-68; DX 14, pp. 3 n. 3, 138-39) (emphasis in original).

[4]In those FCC staff meetings, MCI was told that it would not obtain switched network connections, but neither MCI nor the FCC staff members took any steps to resolve the question whether AT&T's imposition of such a limitation was inconsistent with the *Specialized Common Carriers* decision (Tr. 4295-98).

[5]At trial, MCI Vice-President Kenneth Cox, a former FCC Commissioner, acknowledged the position taken by MCI in its brief, but attempted to dismiss its express endorsement and adoption of the FCC's statement regarding the limited scope of the *Specialized Common Carriers* decision as reflecting "inadequacies" MCI "did not think . . . important enough to try to set the record straight" (Tr. 10313-15).

Notwithstanding the FCC's position before the Ninth Circuit, the then Chief of its Common Carrier Bureau, Bernard Strassburg, sent MCI a letter on October 19, 1973, stating that in his opinion MCI had been authorized to provide FX and CCSA services. On the basis of this letter, MCI secured an injunction from the United States District Court for the Eastern District of Pennsylvania requiring AT&T to provide FX and CCSA interconnections; but that injunction was vacated by the Third Circuit on the ground that a "legitimate dispute" existed as to whether MCI was authorized to provide these services because the meaning of the *Specialized Common Carriers* decision was "unclear."[6]

In the meantime, the FCC itself had initiated a proceeding to examine this question, and in April 1974, it issued a decision in which it acknowledged that its "prior orders may not have been perfectly clear," but ruled nevertheless that the specialized carriers had been authorized to provide FX and CCSA services.[7] Recognizing that this ruling was in conflict with its 1972 brief to the Ninth Circuit, the Commission directed its General Counsel to send the new decision to that court "to dispel any ambiguities the brief may have created" (46 F.C.C.2d at 425 n.14). From then on, AT&T furnished the necessary interconnections to enable MCI to offer FX and CCSA.

B. Proceedings in the District Court.

MCI filed this suit in March 1974, shortly before the interconnection controversy was addressed and resolved by the FCC. The complaint alleged, *inter alia*, that by refusing to provide FX and CCSA interconnections since 1971, AT&T had violated Section 2 of the Sherman Act.

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[6] *MCI Communications Corp.* v. *American Tel. & Tel. Co.*, 496 F.2d 214, 224 (3d Cir. 1974), *vacating* 369 F. Supp. 1004 (E.D. Pa. 1973).

[7] *Bell System Tariff Offerings of Local Distribution Facilities for Use by Other Common Carriers*, 46 F.C.C.2d 413, 427 (1974), *aff'd sub nom. Bell Tel. Co. of Pa.* v. *FCC*, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 442 U.S. 1026 (1975).

Prior to trial, AT&T moved to dismiss the complaint on the ground that the challenged conduct was not subject to the antitrust laws. The District Court denied AT&T's motion (462 F. Supp. 1072), and the case then proceeded to trial.

During the trial, the District Court decided that the meaning of the *Specialized Common Carriers* decision should be treated as a question of fact to be resolved by the jury (Tr. 3788, 8537-38). Consistent with that view, but only after some vacillation,[8] the court permitted both parties to introduce whatever evidence they chose on the meaning of that decision. Thus, Mr. Strassburg, the former Chief of the Common Carrier Bureau, was permitted to testify over AT&T's objection that he wrote the FCC's decision and that in his view that decision was "crystal clear" in authorizing the provision of FX and CCSA by MCI and the other specialized carriers (Tr. 9980, 9801-03, 9886-87).

AT&T requested the trial court to decide the meaning of the *Specialized Common Carriers* decision as a matter of law and to instruct the jury that AT&T had no obligation to provide FX and CCSA interconnections to MCI (Tr. 3780, 3785, 3790; AT&T Inst. No. 39, 39C). Alternatively, AT&T requested that the jury be instructed that, given the representations of MCI and the FCC and other undisputed facts demonstrating the widely held view that the decision did not encompass FX and CCSA, no liability could be found based upon AT&T's denial of interconnections for those services (AT&T Inst. 39D, 39E). Finally, and again alternatively, AT&T requested that Section 201(a) of the Communications Act—the provision governing the rights and obligations of carriers involved in an interconnection dispute—be adequately

[8]Early in the trial, the District Court precluded AT&T from presenting evidence bearing on the public interest considerations justifying its refusal to interconnect (Tr. Dec. 3, 1979, p. 71; Tr. Jan. 24, 1980, p. 47; Tr. Feb. 1, 1980, pp. 3-4; Tr. 3960-61, 4002-04, 9934). The trial court eventually reversed this ruling, but by that time both sides had concluded their direct cases and the trial court had already told the jury that the case would end in a few days (Tr. 9921).

explained to the jury and that the jury be instructed that it could not find AT&T liable unless it found that AT&T's denial of FX and CCSA interconnections was objectively unreasonable in the context of that regulatory scheme and (1) MCI's failure formally to request such interconnections even from the FCC staff until October 1973, and (2) MCI's and the FCC's representations concerning the scope of the FCC's decision (AT&T Inst. 39', 39C').

The District Court refused all the instructions requested by AT&T on these issues. Instead, the jury was instructed to "find that AT&T was guilty" if it determined that AT&T "did know or had good reason to believe they had been ordered to provide the interconnections" (Inst. 27, App. 220a). Even if the jury found for AT&T on that issue, however, it had to overcome a second hurdle. The jury was further instructed that because of a 1977 decision of the Court of Appeals for the District of Columbia Circuit,[9] involving a different controversy and decided three years after the FX-CCSA controversy ended, that "as a matter of law . . . at the time MCI requested FX and CCSA interconnections it was authorized to render those services" (App. 221a). Thus, if the jury did "not find that the *Specialized Common Carriers* decision ordered AT&T to provide FX and CCSA interconnections," it was instructed even then to hold AT&T liable if it found that "AT&T acted with anti-competitive intent" (App. 222a). With the 1977 case injected into this instruction, therefore, the jury was not instructed to base its determination on what AT&T knew or should have known at the time of the denial of interconnections for FX and CCSA—between 1971 and 1974.

[9] *MCI Telecommunications Corp.* v. *FCC*, 561 F.2d 365 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978). In that case, the District of Columbia Circuit, while acknowledging that "the Commission did not perhaps intend [the *Specialized Common Carriers* decision] to open the field of common carrier communications generally," held that the FCC in 1971 had failed to take the steps necessary to impose any restrictions on the operating authority of MCI and the other specialized carriers. As the Court of Appeals in the present case recognized, the District of Columbia Circuit's holding was "perhaps startling" (App. 94a) and "may have taken AT&T and the FCC by surprise" (App. 93a).

The jury found against AT&T on all the charges submitted to it involving interconnection restrictions.

C. The Court of Appeals' Decision.

The Court of Appeals affirmed the denial of AT&T's motion to dismiss. With respect to interconnection, the court recognized that the "FCC has authority to compel interconnection under section 201(a) of the Act," but held that this did not preclude application of the Sherman Act because "the initial decision whether to interconnect rests with the utility" and "the FCC did not control or approve of AT&T's actions here" (App. 26a-27a).

The Court of Appeals agreed with AT&T that the trial court's instructions concerning the effect of regulation "fell short," but it held that the error was harmless. While the court reversed one of MCI's interconnection claims by employing a standard of objective reasonableness (App. 115a-120a), it upheld the jury's adverse findings on the other interconnection claims by assessing those claims under a subjective intent standard. The Court of Appeals concluded that "regardless whether AT&T reasonably believed that *Specialized Common Carriers* did not require interconnections," the jury was entitled to conclude that "AT&T did not act in good faith when it purportedly determined that the public interest justified its denial of interconnections" (App. 102a).[10]

REASONS FOR GRANTING THE WRIT

The questions presented in the cross-petition are substantial. Indeed, as will be shown below, standing alone they merit review

[10]Approximately one month before the Court of Appeals' decision, in a case by another of AT&T's competitors involving identical claims, Judge Charles Richey, after a bench trial, found that AT&T did not violate the antitrust laws. On the FX-CCSA issue specifically, Judge Richey found "that AT&T acted reasonably in refusing voluntarily to provide FX or CCSA interconnections until the FCC's April 1974 decision." *Southern Pacific Communications Co.* v. *American Tel. & Tel. Co.*, 556 F. Supp. 825, 986 (D.D.C. 1983), *appeal pending*, No. 83-1102 (D.C. Cir.).

by this Court at some stage of this case, for properly resolved they require dismissal of MCI's entire claim.

I. Proper Accommodation Of The Antitrust Laws With Section 201(a) Of The Communications Act Required Dismissal Of MCI's Interconnection Charges.

The question of accommodating the Sherman Act with Section 201(a) of the Communications Act is, as Judge Harold H. Greene observed in *United States* v. *American Tel. & Tel. Co.*, 524 F. Supp. 1336, 1359 (D.D.C. 1981), "obviously a difficult one," for which "there is little judicial precedent." However, the question is of vital importance not only to participants in the telecommunications industry, but to other regulated firms as well.

This Court has held that matters at the heart of a pervasive scheme of common carrier regulation are not subject to antitrust prosecution, whether or not the specific conduct at issue has been ordered by regulatory authorities. See *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363, 387 (1973); *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296, 300-05 (1963); *Terminal Warehouse Co.* v. *Pennsylvania R. Co.*, 297 U.S. 500, 511-15 (1936).[11] The critical questions are whether

[11]Although this Court has not addressed the question of whether the antitrust laws may properly be applied to common carriers subject to Title II of the Communications Act, it has rejected efforts to apply the antitrust laws to common carrier regulation under the Interstate Commerce Act, the statute upon which the Communications Act was modeled. See *Terminal Warehouse Co.* v. *Pennsylvania R. Co.*, *supra*; *Keogh* v. *Chicago & N.W.R. Co.*, 260 U.S. 156 (1922). See also *United States* v. *Radio Corporation of America*, 358 U.S. 334 (1959), where this Court observed that the broadcasting industry, regulated under Title III of the Communications Act, was far less "extensive[ly] control[led]" than common carriers regulated under Title II. Lower courts are split on the question whether Section 201(a) displaces antitrust liability. *Compare Southern Pacific Communications Co.* v. *American Tel. & Tel. Co.*, *supra*, 556 F. Supp. at 1095-96, *with Mid-Texas Communications Systems, Inc.* v. *American Tel. & Tel. Co.*, 615 F.2d 1372 (5th Cir.), *cert. denied*, 449 U.S. 912 (1980), and *United States* v.

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antitrust immunity is "necessary to make the regulatory scheme work," *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357 (1963), and whether without immunity the regulated firm "would be . . . subject[ed] . . . to conflicting standards." *Gordon* v. *New York Stock Exchange, Inc.*, 422 U.S. 659, 689 (1975).

Both factors are present here. Section 201(a) of the Communications Act presupposes that some interconnections are not in the public interest and will be denied, and it entrusts the ultimate decision of whether a particular interconnection is in the public interest to the FCC. In order for the regulatory scheme to work, however, Section 201(a) "places the initial onus of refusal on Bell" because "without the refusal, an undesirable interconnection could occur." *Mid-Texas Communications Systems, Inc.* v. *American Tel. & Tel. Co.*, 615 F.2d 1372, 1380 (5th Cir.), *cert. denied*, 449 U.S. 912 (1980). Moreover, in assessing an interconnection request, carriers are required to consider factors other than the effect on competition. *FCC* v. *RCA Communications, Inc.*, 346 U.S. 86, 93-94 (1953). Indeed, because a denial of interconnections inevitably results in an obstruction to entry, interconnections could never be denied if only competitive factors were considered.

The Court of Appeals simply did not face up to the workings of Section 201(a). Instead, it upheld denial of AT&T's motion to dismiss simply because "the FCC did not control or approve of AT&T's action here" (App. 26a-27a). Such reasoning turns Section 201(a) on its head. If the question of antitrust liability depends upon whether the regulatory agency subsequently ratifies

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American Tel. & Tel. Co., 461 F. Supp. 1314 (D.D.C. 1978). In other contexts not involving Section 201(a), the lower courts have generally rejected arguments that communications common carriers are not subject to the antitrust laws. See, *e.g.*, *Northeastern Tel. Co.* v. *American Tel. & Tel. Co.*, 651 F.2d 76 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982).

the carrier's initial interconnection refusal, then to protect themselves from treble damage liability, carriers would be forced as a practical matter to grant every demand for interconnection—regardless of the merits of the request, regardless of the unresolved public interest questions, and regardless of whether such interconnection may burden the carrier's customers with unnecessary costs. Such an approach would thwart "the delicate mechanism by which the FCC determines which developments in the telecommunications industry might best serve the public interest." *United States* v. *American Tel. & Tel. Co.*, 524 F. Supp. 1336, 1359 (D.D.C. 1981). It would allow the entity seeking interconnection "to do at will what [the FCC] cannot do without a finding, after opportunity for a hearing, that such action is 'necessary or desirable in the public interest,' and would result in a clear circumvention of the Congressional intent expressed in Section 201(a) of the Act." *American Tel. & Tel. Co.*, 42 F.C.C. 1, 20 (1949).

The assertion of antitrust jurisdiction over the interconnection charges in this case permitted wastefully duplicative litigation, and allowed the unseemly spectacle of a jury trying to interpret a regulatory decision that neither the trial court nor the Court of Appeals found intelligible, reaching a decision inconsistent with representations made by both the plaintiff and the regulatory agency to another Court of Appeals, and generally second-guessing actions taken by a utility caught in the midst of a decade of evolution, change and turmoil in the regulatory process. Such a result was not only unfair to AT&T, but entirely unnecessary to protect MCI, whose entitlement to the interconnections at issue was resolved by the FCC promptly upon MCI's bringing the matter to the Commission for resolution. This is precisely the situation this Court has sought to avoid in holding that matters going to the heart of a pervasive scheme of regulation should not be subject to antitrust liability.

II. The Instructions Sanctioned By The Court Of Appeals Failed To Provide Adequate Guidance To The Jury Regarding The Accommodation Of The Sherman Act And The Communications Act.

Even where the regulatory scheme in question does not displace the antitrust laws, this Court has emphasized the necessity of antitrust courts taking account of the regulatory scheme, stressing that the "failure to do so would produce misconceptions that go to the heart" of antitrust doctrines. *United States* v. *Marine Bancorporation, Inc.*, 418 U.S. 602, 627 (1974). To allow the regulators and the regulated firms "sufficient breathing space within which to carry out [their] mandate," this Court has directed that a Rule of Reason analysis be employed even though a *per se* rule would normally be applicable if the defendant were not subject to regulation. *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 360 (1963). By upholding the trial court's refusal to instruct the jury with respect to Section 201(a) and by employing a subjective intent test, the Seventh Circuit's decision violates these fundamental principles.

A. An Instruction Specifying The Significance Of Section 201(a) Was Essential In This Case.

In *Mid-Texas Communications Systems, Inc.* v. *American Tel. & Tel. Co.*, *supra*, the Fifth Circuit, after analyzing the interrelationship of Section 201(a) and Section 2 of the Sherman Act in a case challenging Bell's refusal to interconnect with a new local telephone company, held that the trial court "erred" in failing to give instructions that spelled out the "structure and effect" of Section 201(a) (615 F.2d at 1389):

> "This holding is based on the structure and effect of section 201(a) under which the FCC, upon appropriate demand, is empowered to determine whether a particular interconnection is in the public interest. . . . [I]t is possible that in certain situations, interconnection will not be in the public interest. . . . In those instances, public policy will be vindicated only if in-

> terconnection is denied. Prevention can occur only if the private utility denies interconnection in the first instance. Where the private concern properly denies an interconnection, it would be contrary to the public policy to permit antitrust liability against it."

The Seventh Circuit's failure to require the trial court to give the Section 201(a) instruction requested by AT&T cannot be reconciled with the Fifth Circuit's holding in *Mid-Texas*. With the meaning of the *Specialized Common Carriers* decision left an open question by the trial court, instructing the jury with respect to Section 201(a) was imperative. MCI's own witness conceded that its request for FX and CCSA interconnections raised public interest questions within the FCC's area of responsibility (Tr. 10097), and Section 201(a) is specifically structured to permit resolution of such questions by the FCC after the interconnections initially have been withheld. Indeed, the Court of Appeals recognized the importance of Section 201(a) and held that the trial court's "instruction fell short to the extent that it did not explain the particular provision of the Act" (App. 97a). The Court of Appeals, however, did not consider this error "fatal", because in its view the defect was merely the lack of sufficient "detail" of regulation (*id.*).[12]

The fault of the instruction, however, was not in the lack of "detail", but rather the refusal to tell the jury at all about AT&T's defense and the crucial point of Section 201(a)—that AT&T had a regulatory duty to decide in the first instance

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[12]The Court of Appeals also attempted to justify the admittedly defective instruction on the ground that AT&T had an opportunity to argue the matter during closing argument (App. 97a). This same contention was squarely rejected in *Mid-Texas* (615 F.2d at 1390 n.16):

> "Bell's presentation of evidence on regulation and discussion during closing argument cannot in and of itself justify the district court's failure to provide guidance on the issue for without specific instruction the jury has no indication how such evidence was to be used in its deliberations. To hold otherwise would be to abrogate the district court's duty to instruct the jury accurately."

whether a given interconnection was in the public interest and should be withheld subject to a proceeding before the FCC. The Court of Appeals' decision thus conflicts directly with the holding in *Mid-Texas* where the Fifth Circuit reversed because the failure to instruct the jury concerning the "structure and effect" of Section 201(a) "is too central to be harmless error" (615 F.2d at 1390 n.16).

In *Silver* v. *New York Stock Exchange*, *supra*, 373 U.S. at 360, this Court specifically defined the significance of regulation in the antitrust arena:

> "The entire public policy of self-regulation, beginning with the idea that the Exchange may set up barriers to membership, contemplates . . . restraints of trade which might well be unreasonable absent sanction by the Securities Exchange Act. Without the oversight of the Commission to elaborate from time to time on the propriety of various acts of self-regulation, the Exchange is left without guidance and without warning as to what regulative action would be viewed as excessive by an antitrust court. . . . But, under the aegis of the rule of reason, traditional antitrust concepts are flexible enough to permit the Exchange sufficient breathing space within which to carry out the mandate of the Securities Exchange Act."

The instructions given in this case do not remotely satisfy the standards articulated in *Silver*. No mention was made of the fact that the Communications Act, like the Securities Exchange Act, "contemplates restraints of trade that might well be unreasonable absent sanction by the . . . Act"; no mention was made of the fact that absent specific guidance from the responsible regulatory agency, a regulated firm is left "without guidance and without warning as to what regulative action would be viewed as excessive by an antitrust court;" and no mention was made of the critical concept that the antitrust laws must be interpreted, when applied to extensively regulated firms, in a manner sufficiently flexible to provide "breathing space" within which the regulatory process can continue to function (373 U.S. at 360).

In this case, the trial court not only did not describe and explain the pertinent portions of the Communications Act to the jury, it did not even mention them. Notwithstanding the pervasive impact of regulation on the interconnection issue, the instructions treated regulation and its impact upon the reasonableness of AT&T's conduct almost as though it did not exist. Such a result cannot be squared with *Mid-Texas* or *Silver*.

B. The Antitrust Liability Of A Regulated Firm Should Be Determined By Reference To An Objective Standard.

The failure of the trial court to instruct the jury regarding the structure and effect of Section 201(a) was exacerbated by its instructing the jury to use a subjective intent standard in assessing MCI's interconnection charges. Such a standard subverts the very nature of the regulatory scheme because it necessarily invites a finding of anticompetitive intent when interconnections are withheld even where such action is taken pursuant to the regulatory scheme.

As explained above, Section 201(a) envisions that a carrier will withhold interconnections when the request raises unresolved public interest questions so that those questions can be addressed by the FCC. Such action, however, by definition involves an obstruction of entry. Yet the Court of Appeals held that the jury could have properly rejected AT&T's Section 201(a) defense on the ground that "the evidence supports an inference that . . . AT&T . . . used the public interest standard in bad faith" because "AT&T intended to obstruct MCI's entry into the market" (App. 100a). This is tantamount to saying that all refusals of interconnection on public interest grounds are unlawful because a carrier must be regarded as intending the obvious consequences of its actions.[13] A separation of "good faith" from "bad faith" refusals

[13]The problem is most acute where, as here, the Commission ultimately determines that the requested interconnection is in the public interest. Although the carrier may have only been complying with the procedure

(Footnote continued on next page)

simply cannot be made on the basis of a carrier's subjective intent "to obstruct . . . entry."

A subjective intent standard, therefore, has the anomalous effect not only of abrogating the Rule of Reason by converting an interconnection refusal into an antitrust violation, but of frustrating the intent of Congress embodied in the Communications Act that interconnections will in some circumstances properly be refused. A regulated firm must have a zone of reasonableness within which it may legally act on its interpretation of the statutory scheme—even if, as here, its acts are not subsequently approved by the regulatory body. The only way to ensure that the mandate of the regulatory scheme is followed is to assess whether the utility's action "was reasonable . . . in light of the relevant factors concerning the public interest." *Mid-Texas*, *supra*, 615 F.2d at 1390. The focus on subjective intent ignores these interests and led the Court of Appeals to treat the existence of effective regulatory supervision, which ought to undercut any possibility of a finding of monopolization, as supportive of the jury's finding of bad faith.

It is for this reason that other Courts of Appeals have applied an objective standard when evaluating a regulated firm's conduct in an antitrust case. See, *e.g.*, *Mid-Texas*, *supra*, 615 F.2d at 1390; *Phonetele, Inc.* v. *American Tel. & Tel. Co.*, 664 F.2d 716, 737-43 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 785 (1983); *Northeastern Tel. Co.* v. *American Tel. & Tel. Co.*, *supra*, 651 F.2d at 93 (focusing on reasonableness of the conduct, not whether it was "undertaken with an altruistic purpose"); *Hospital Building Co.* v. *Trustees of Rex Hospital*, 691 F.2d 678, 686

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prescribed in the Communications Act, which empowers the FCC—not the carrier—ultimately to resolve public interest questions, the jury will necessarily infer from the Commission's action that the carrier's conduct was unlawful. In such instances, the carrier will be subjected to treble damage liability simply because it did not accurately predict how the FCC would ultimately resolve the public interest questions raised.

(4th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3738 (U.S. April 6, 1983) (No. 82-1633), *cross-petition for cert. filed*, 51 U.S.L.W. 3807 (U.S. April 28, 1983) (No. 82-1762) (defendant's conduct must be "objectively assessed").

The decision of the Seventh Circuit on the interconnection charges squarely conflicts with the holdings of these other Courts of Appeals and even conflicts with its own holding in this case rejecting a "state of mind" test in evaluating MCI's predatory pricing claims, because such a test is "unworkable" and "encourage[s] inconsistent and quixotic results" (App. 46a).

No more "quixotic" outcome than the result below can be imagined. With the District Court and the Court of Appeals both recognizing the ambiguity in the *Specialized Common Carriers* decision, with both the FCC and MCI telling the Ninth Circuit in 1972 that the decision did not encompass switched services such as FX and CCSA, and with MCI never formally raising the matter with the FCC until October 1973, a properly instructed jury—aware of Section 201(a) and applying a standard of objective reasonableness—could not rationally have reached the verdict now before this Court.

CONCLUSION

In the event this Court grants MCI's petition for a writ of certiorari, it should also grant review of the questions presented in this cross-petition.

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